**Union Calendar No. 163**

96th Congress, 1st Session - - - - - - - - - - House Report No. 96-280



# JUSTICE DEPARTMENT HANDLING OF CASES INVOLVING CLASSIFIED DATA AND CLAIMS OF NATIONAL SECURITY

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SECOND REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

together with

ADDITIONAL VIEWS

JUNE 18, 1979.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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## LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
*Washington, D.C., June 18, 1979.*

Hon. THOMAS P. O'NEILL, Jr.,
*Speaker of the House of Representatives,*
*Washington, D.C.*

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's second report to the 96th Congress. The committee's report is based on a study made by its Government Information and Individual Rights Subcommittee.

JACK BROOKS,
*Chairman.*

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96TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 96-280

# JUSTICE DEPARTMENT HANDLING OF CASES INVOLVING CLASSIFIED DATA AND CLAIMS OF NATIONAL SECURITY

JUNE 18, 1979.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BROOKS, from the Committee on Government Operations, submitted the following

## SECOND REPORT

together with

## ADDITIONAL VIEWS

BASED ON A STUDY BY THE GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS SUBCOMMITTEE

On June 12, 1979, the Committee on Government Operations approved and adopted a report entitled "Justice Department Handling of Cases Involving Classified Data and Claims of National Security." The chairman was directed to transmit a copy to the Speaker of the House.

### I. INTRODUCTION

Equal enforcement of our criminal statutes has at times been thwarted by claims of national security. The question is when does the Government's interest in protecting national security data from needless exposure outweigh its interest in prosecuting crimes, particularly those crimes committed by Government employees engaged in intelligence work. In a recent address to Central Intelligence Agency employees the Attorney General underscored the problem:

> "Graymail" has become shorthand for the ability of a defense lawyer to use current legal procedures to gain leverage by seeking a court ruling compelling Government disclosure of national security information. The Government is then forced into the position of sustaining the damage of the disclosure or conceding a critical point or dropping the case altogether.
>
> In cases involving classified information, there is an inevitable tension between the responsibility of the Director of Central Intelligence to prevent the compromise of intelli-

> gence sources and methods and the responsibility of the Attorney General for vigorous enforcement of the criminal laws. That tension is exacerbated by "graymail" problems. It is ironic and unfortunate that espionage prosecutions brought to maintain necessary secrecy often pose risks of disclosing our secrets under the current system * * *.
>
> Although the same procedural problems exist in non-espionage prosecutions, the most serious consequences for the CIA and Justice occur when criminal law enforcement efforts yield to security concerns. Inevitably, there are claims that a prosecution was dropped at the urging of the intelligence community to avoid embarrassing revelations of misconduct. Even more importantly there is the danger that those associated with intelligence activities are treated or perceived as above the law * * *.[1]

The problem had been made even more vexing by the disclosure in 1975 of a 20-year-old understanding between Justice and CIA, that the Intelligence Agency felt exempted it from having to inform Federal prosecutors about criminal activity by CIA personnel. Obviously, without full disclosure to Justice and the prompt forwarding of cases of legal propriety, much of the intelligence community's activities and that of its employees would remain effectively closed to investigation and possible prosecution.

The Subcommittee on Government Information and Individual Rights examined these questions in two stages.

In 1975, the subcommittee conducted hearings concerning the reporting of intelligence employee criminal violations and the 1954 Justice-CIA agreement. Under the arrangement, CIA officials testified that if they considered the risk of exposure of intelligence secrets at open trial excessive, they would close the file and not notify the Justice Department of the case. The CIA identified nine cases that had been handled in this fashion. Federal law, however, specifically charges each agency head to expeditiously report evidence of criminal wrongdoing, and places responsibility for the prosecutorial decision with the Attorney General. Title 28, United States Code, § 535(b) requires that:

> (b) Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless—
>
> (1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
>
> (2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.

[1] Excerpt from address by Attorney General Griffin B. Bell on "Foreign Intelligence and the Legal System" delivered Tuesday, May 8, 1979, at the Central Intelligence Agency, Langley, Va., Department of Justice transcript at 7–9.

The hearing did raise the need to clarify the code section to narrow the apparent broad discretion given the Attorney General under § 535(b)(2) to exempt agencies from reporting to Justice whole categories of crimes not otherwise assigned by law.

The subcommittee also examined in its 1975 hearings the circumstances behind the dropping of a Federal indictment against a Thai citizen on the CIA payroll allegedly involved in the shipment to Chicago of 25 kilos of raw opium—the largest drug bust of its kind in the city's history. Principal issues involved the inability of the prosecutors to gain access to needed CIA materials and the failure of high Justice Department officials to insist on examining such materials before deciding whether to dismiss the indictment.

The conflicting values in handling such cases were publicly highlighted by the Justice Department in early 1977 when it announced its reasons for declining to prosecute present and former Government officials involved in the CIA's 1953–73 mail opening programs. Under these programs, certain mail received by citizens from foreign countries or sent overseas, had been routinely opened and photographed. The mail opening case was notable because the Department broke with long-standing tradition and published its reasons for deciding not to prosecute.[2]

In 1978, the subcommittee reexamined the reporting and information access relationships between the Department and the CIA, particularly changes that had taken place since the 1975 hearings. The CIA and the Justice Department had earlier agreed that continued reliance on the 1954 agreement between them was inappropriate, and at the subcommittee's urging, the two executed a new written agreement in January 1978, since modified twice. It provides a system for the referral in every instance of evidence of criminal violation by a CIA employee, and assures the Department of Justice access in such case to all information in the possession of CIA it determines necessary to investigate and prosecute the violation.

Although it is impossible for any written procedure to guarantee that it will always be followed, the current agreement and operating procedures between the Department of Justice and the Central Intelligence Agency appear to provide sufficiently for access and referral. The end of the so-called 1954 understanding and the establishment of these reporting procedures represent a significant reform in oversight of the intelligence community and rightfully return the decision to prosecute to the prosecutor.

The subcommittee's 1978 hearings also considered in a broader context the problems of defendant's rights versus national security which are posed where highly classified information is relevant to a criminal case. An increasing number of cases with such considerations, including espionage cases, are reaching the courts. Comparable difficulties also can occur in civil proceedings.

Questions of information access by Justice and referral of criminal allegations by Government agencies are far easier to resolve than the national security conflicts which can arise in legal proceedings. National security problems seem always to come down to a case-by-case weighing of the detriments that may arise from disclosure of security

[2] The Justice Department's January 14, 1977, statement is printed as an appendix to this report.

information versus the detriments that may result from nondisclosure. Most often the question is whether a particular prosecution is worth the potential dangers resulting from revealing information that is necessary for the prosecution. En route to this decision there are frequently procedural debates over whether particular information is relevant to the proceeding or whether it can be used in the proceeding in some restricted manner that both preserves an individual's rights and minimizes security disclosures.

Although CIA was the only intelligence organization with which the subcommittee dealt, similar problems can occur with other such components. The relationships approved or recommended in this report for the Justice Department and CIA should apply in principle to the working relationship between the Justice Department and other intelligence agencies.

Hearings were held on July 22, 23, 29, 31 and August 1, 1975, at which present and former officials of the Department of Justice and Central Intelligence Agency, and officials of the Customs Service testified. Representatives of the Department of Justice and the CIA testified at hearings on September 18, 1978.

## II. CIA Reporting of Offenses to Department of Justice

### A. Title 28, United States Code, Section 535(b)

Congress passed section 535(b) in 1954[3] to require agency officials, with certain exceptions, to report to the Attorney General criminal violations involving Government employees. At least twice thereafter, Attorneys General called the requirement to the attention of agency heads in memoranda. Attorney General Herbert Brownell, Jr., sent such a memo in 1956 and Attorney General John N. Mitchell sent one in 1971.[4] These memoranda emphasize prompt reporting of any information, even where there is doubt that the offense occurred. Whether the Attorney General will prosecute such referrals, however, is within his traditional scope of discretion.[5] President Carter's Executive order on intelligence activities also requires senior officials of the intelligence community to report to the Attorney General evidence of possible violations of Federal criminal law by an employee of their department or agency.[6]

### B. The 1954 Agreement

In 1954, several months before the reporting statute cited above became law, CIA General Counsel Lawrence Houston met with Deputy Attorney General William P. Rogers to discuss problems the CIA occasionally encountered involving criminal prosecution of CIA personnel and the danger of the revelations of sensitive information which could occur during an open trial on such a matter. On March 1,

[3] 68 Stat. 998. The text of the statute appears in the introduction of this report at p. 2.

[4] See "Justice Department Treatment of Criminal Cases Involving CIA Personnel and Claims of National Security," hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 94th Congress, 1st session, July 22, 23, 29, 31, and Aug. 1, 1975 [hereinafter referred to as 1975 hearings] at 8–9 for text of memos.

[5] See, e.g., *Powell* v. *Katzenbach*, 359 F. 2d 234 (D.C. Cir.), *cert. denied* 384 U.S. 967 (1965).

[6] See Executive Order No. 12036, 43 Fed. Reg. 3675 § 1–706 (1978). The order also requires inspectors general and general counsels of agencies in the intelligence community to timely report to the Intelligence Oversight Board any intelligence activities that come to their attention that raise questions of legality or propriety. Id. at § 3–201.

1954, Houston sent Rogers the following memorandum which in turn enclosed a memorandum to the CIA director concerning the earlier Houston-Rogers discussion. These memoranda constitute the so-called 1954 agreement:

MARCH 1, 1954.

Memorandum for: Deputy Attorney General, Department of Justice, Washington 25, D.C.

Subject: Reports of criminal violations to the Department of Justice.

Attached is a memorandum for the record, addressed to the Director, of my understanding of our conversation regarding the investigation of possible criminal activities arising out of our activities. If you find no objection to this statement, please return and we will retain it in our files for future guidance.

LAWRENCE R. HOUSTON,
*General Counsel.*

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FEBRUARY 23, 1954.

Memorandum for: Director of Central Intelligence.

Subject: Reports of criminal violations to the Department of Justice.

1. From time to time information is developed within the Agency indicating the actual or probable violation of criminal statutes. Normally all such information would be turned over to the Department of Justice for investigation and decision as to prosecution. Occasionally, however, the apparent criminal activities are involved in highly classified and complex covert operations. Under these circumstances investigation by an outside agency could not hope for success without revealing to that agency the full scope of the covert operation involved as well as this Agency's authorities and manner of handling the operation. Even then, the investigation could not succeed without the full assistance of all interested branches of this Agency. In addition, if investigation developed a prima-facie case of a criminal violation, in many cases it would be readily apparent that prosecution would be impossible without revealing highly classified matters to public scrutiny.

2. The law is well settled that a criminal prosecution cannot proceed in camera or on production of only part of the information. The Government must be willing to expose its entire information if it desires to prosecute. In those cases involving covert operations, therefore, there appears to be a balancing of interest between the duty to enforce the law which is in the proper jurisdiction of the Department of Justice and the Director's responsibility for protecting intelligence sources and methods. This is further affected by practical considerations.

3. I have recently had two conversations with the Department of Justice, the latter on February 18, being with the Deputy Attorney General, Mr. William P. Rogers. To illustrate the problem I took with me the complete investigation, with conclusions and recommendations, of a case which indicated a variety of violations of the various criminal statutes relating to the handling of official funds. This case arose during the review of a highly complex clandestine operation. The information was developed by the Inspection and Review Staff, Deputy Director (Plans), and even in its completed form would

be almost unintelligible to a person not thoroughly familiar with the Agency and its operations due to the use of pseudonyms and cover companies and to various circumstances arising out of operational conditions.

4. I pointed out to the Deputy Attorney General that review by my office indicated that the individual was almost certainly guilty of violations of criminal statutes, but that we had been able to devise no charge under which he could be prosecuted which would not require revelation of highly classified information. Mr. Rogers said that under these circumstances he saw no purpose in referring the matter to the Department of Justice as we were as well or, in the light of the peculiar circumstances, perhaps better equipped to pass on the possibilities for prosecution. Therefore, if we could come to a firm determination in this respect, we should make the record of that determination as clear as possible and retain it in our files.

5. If, however, any information arising out of our investigation revealed the possibilities of prosecution, then we would have an obligation to bring the pertinent facts to the attention of the Department of Justice. I agreed that any doubt should be resolved in favor of referring the matter to the Department of Justice. I also pointed out that even in cases where we felt prosecution was impossible, if a shortage of funds were involved we took whatever collection action was feasible and, in spite of the problems arising out of the covert nature of our operations, were frequently successful in recovering the funds, at least in part. I also mentioned that our investigation sometimes indicated possible tax evasion or fraud which did not involve operations, and that we worked with the Internal Revenue Service in such situations.

6. Mr. Rogers asked that we follow through carefully on any such case with any appropriate Government agency. He stated that an understanding on these matters could be reduced to a formal exchange of letters, if it becomes necessary, but that he saw no reason why present practices could not be continued without further documentation. I said it had been my recommendation not to formalize the situation unless the matter were brought to an issue either by passage of legislation and a need for clarification thereof or by discussion on specific cases with the Criminal Division of the Department of Justice.

LAWRENCE R. HOUSTON,
*General Counsel.*

A former Justice Department official testified that the Department considered there was no signed agreement between it and the CIA, only a pattern of understanding.[7] The record indicates that even knowledge of any such pattern of understanding soon became nonexistent. The subcommittee questioned, by staff interviews and letters, many of the Attorneys General and Criminal Division and Internal Security Division department heads who held office since 1954; none was familiar with any arrangement with the CIA such as that described in the Houston memorandum. Houston testified that briefings were not given to Attorneys General about the arrangement after 1954.[8] Houston believed that once Justice Department approval was

[7] See 1975 hearings at 409 (deposition of James Wilderotter).
[8] Id. at 20.

received, the agreement could be followed indefinitely [9] and that there was no need to raise the question since the Agency continued to work "in close cooperation" with Justice.[10]

The language of 28 U.S.C. § 535(b)(2), which was passed a few months after the 1954 agreement, does not appear to contemplate any such informal delegation of the Department of Justice's powers. In any event, 535(b)(2) covers only the delegation of investigation responsibility, not the power to decide whether or not prosecution is feasible.[11]

In December 1974, CIA Director William Colby informed Acting Attorney General Laurence Silberman of the 1954 agreement in connection with the referral of a case from the CIA to the Justice Department involving former CIA Director Richard Helms' testimony before a Senate committee. Silberman did not know of the agreement. He and Colby agreed that it was inappropriate. As an outcome of their meeting, the agreement was thereafter considered inoperative.[12]

Whether the 1954 agreement absolved CIA from reporting only illegal activities not authorized by the Intelligence Agency or whether it extended also to so-called authorized activities is disputed. Embezzlement of agency funds by an employee is an example of an unauthorized illegal activity. An employee's intercepting and opening sealed mail on direction from his superiors may be an authorized illegal activity. Former Associate Deputy Attorney General James Wilderotter testified that the agreement covered both situations.[13] Former CIA General Counsel Lawrence Houston and General Counsel John Warner testified that the agreement was designed only to cover unauthorized illegal activities.[14]

The CIA justified its use of the agreement on the basis of its statutory responsibility to protect intelligence sources and methods.[15] It told the subcommittee that it had considered 30 cases between 1954 and 1974 involving possible Federal crimes by CIA personnel, all involving acts either not authorized by CIA or committed outside the line of duty. None involved the CIA's domestic mail intercept or wiretap programs. Of these, 20 reached the Department of Justice, 14 on referral from CIA and 6 on referral from other sources or agencies.[16] Two cases were referred to other agencies.[17] CIA decided on its own in nine cases that prosecution was not feasible, and hence did not bring these to Justice's attention. These nine involved three misuses

[9] Id. at 20-21.
[10] Id. at 21.
[11] There appears to be need to clarify the statute on this point, although the Justice Department says it knows of no other agreements between itself and other Federal agencies delegating prosecutorial discretion in such circumstances. Id. at 405. The Department does, however, have agreements with other agencies concerning investigation of allegations against their employees. See, for example, Justice Department Handling of Cases Involving Classified Data and Claims of National Security, hearings before a subcommittee of the House Committee on Government Operations, 95th Congress, 2d session at app. 1 (1978) [hereinafter cited as 1978 hearings].
[12] 1975 Hearings at 76-77, 403-08; See Central Intelligence Agency Exemption in the Privacy Act of 1974, hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 94th Congress, 1st session, Mar. 5 and June 25, 1975, at 203, 210 (testimony of CIA Director Colby).
[13] Id. at 405-06.
[14] Id. at 18, 103.
[15] Id. at 5; See 50 U.S.C. § 403(d). CIA General Counsel Lapham testified however, that it is his opinion that a disclosure of any sort to the Department of Justice in the course of the performance of its duties would be an authorized disclosure, not restricted by 50 U.S.C. 403(d). See 1978 hearings at 64.
[16] See 1975 hearings at 388-89 (letter from Department of Justice).
[17] See Central Intelligence Agency Exemption in the Privacy Act of 1974, hearings before a subcommittee of the Committee on Government Operations, House of Representatives, 94th Congress, 1st session, Mar. 5 and June 25, 1975 at 205 (letter from CIA to Department of Justice).

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of funds, two thefts, and one each black marketeering, extortion, fraud and theft of services.[18]

Regardless of whether the agreement was sound policy when reached in 1954, it seems clear that it did not rise to the level of formality necessary to satisfy the requirements of 28 U.S.C. § 535(b). From a policy standpoint, the committee believes as did Director Colby and Acting Attorney General Silberman in 1974, that the arrangement was not proper. Except as might be expressly provided by statute, the Department should not delegate to another agency its statutorily conferred powers of prosecutorial discretion.

### C. THE 1978 AGREEMENT

After the Department of Justice became aware of and abrogated the 1954 agreement, the Department and the CIA began in 1975 to work out a memorandum of understanding for carrying out the requirements of 28 U.S.C. § 535. The Director of Central Intelligence signed such a memorandum in January 1978; however, it was revised slightly in September 1978 as a result of Executive Order 12036 governing intelligence operations.[19]

This memorandum provided in essence that:

> CIA conducts a preliminary inquiry upon receiving information that its officers or employees may have violated a Federal criminal statute.
>
> Except where the preliminary inquiry establishes in a reasonable time that there is no reasonable basis to believe that a crime was committed, the CIA is to refer the matter to the Justice Department.[20]
>
> If, in the CIA's view, further investigation would not publicly disclose classified information, intelligence sources and methods or jeopardize security of ongoing intelligence operations, such referral is to the FBI, U.S. attorney or other appropriate investigative agency.
>
> If such disclosures or jeopardy is feared, the CIA is to refer the matter in writing to the Criminal Division of the Justice Department, after which decisions will be made by the Department on further investigation or prosecution.[21]

The memorandum, however, also provided that the nature, scope, and format of the written reports could vary on a case-by-case basis depending on an assessment by CIA and the Criminal Division of the matters reported.[22] Further, the memorandum permitted the Director of Central Intelligence to directly refer matters to the Attorney General with no requirement that this referral be in writing.[23] The subcommittee expressed concern at the 1978 hearing that these two latter provisions could be used as loopholes to minimize or eliminate

[18] Id. at 204–05, 1975 hearings at 392. The statute of limitations appeared to have run on at least five and perhaps seven of these nine cases by the time they became known to the Justice Department. The Department, however, asked the CIA to provide information on all nine. See 1975 hearings at 50.

[19] See 1978 hearings at 6.

[20] The statute does not provide for such a preliminary inquiry, and other agencies generally have been urged to report promptly to the Justice Department any allegations against their employees. See note 4 and accompanying text.

[21] See 1978 hearings at 9.

[22] Id. at 10.

[23] Id.

the written records which ought to be maintained concerning such case referrals.[24]

The Department of Justice and CIA responded to the subcommittee's concerns by redrafting these two portions of the agreement to require that any reference from CIA would be in such written detail as the Department of Justice component receiving the report shall determine, and that any reference directly from the Director of Central Intelligence to the Attorney General shall be in writing.[25] The memorandum also was modified to provide that interpretation of its provisions shall be by the Department of Justice and consistent with 28 U.S.C. § 535 and Executive Order 12036.[26]

As modified, the memorandum of understanding provides a basis for implementing CIA's reporting responsibilities to the Department of Justice under 28 U.S.C. § 535. The right of the Department to have access to all information it requires is contained in the provision of the memorandum which provides for written reports from CIA "in such detail as the Department of Justice component receiving the report shall determine."[27] It is the practice that CIA will in some instances use "John Doe" pseudonyms for the names of individuals in initial reports to the Department.[28] This is not objectionable since the memorandum assures the Department the right to obtain names as it deems necessary.

## III. Department of Justice Access for Internal Use to Information Held by CIA

If the Department of Justice is to successfully prosecute or make an informed decision not to prosecute cases involving national security personnel or information, it must have reasonable access to information which is in the possession of the intelligence agencies concerning those cases. This issue is broader in application than that of an agency's reporting criminal activity to the Department. It also may encompass cases which come to the Department's attention by means other than an agency's report, and cases where agency personnel or operations are involved but no agency employee is a suspect. Not only must initial reports from the agency provide information, but the Department, in building a case, must be able to utilize information in the hands of the agency. This implies the need for agency cooperation, since the Department may not always know precisely what to ask for.[29]

### A. THE KHRAMKHRUAN AND HELMS CASES

Two relatively recent cases illustrate the range of access to information that the CIA has offered to the Department of Justice in its pursuit of criminal investigations, and the range of the Department's efforts or lack of efforts to obtain such information.

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[24] Id. at 32-37.
[25] Id. at 57 (note from Robert L. Keuch, Deputy Assistant Attorney General, to subcommittee of Sept. 29, 1978).
[26] Id. at 57, app. 5.
[27] Id. at 6.
[28] Id. at 9.
[29] See 1978 hearings at 67. The Department may encounter a problem if one agency holds classified information originated by another agency. Under the so-called "third agency" rule, the originating agency must consent to the disclosure of the information. See Subcommittee on International Organizations of House Committee on International Relations, 94th Congress, 2d session, Investigation of Korean-American Relations at 130, 157 (Oct. 31, 1978).

*1. Inadequate access: The Puttaporn Khramkhruan case* [30]

In January, 1973, a shipment of 25 kilos of raw opium was detected by Customs Service detector dogs in New York. It was forwarded to Chicago and seized at the point of delivery. An envelope identifying one Puttaporn Khramkhruan was found in the contents. In May, 1973, the Customs Service asked its Bangkok representative to find Khramkhruan at Chiang Mai, Thailand, the point of origin of the seized shipment. The customs agent learned that Khramkhruan was normally a CIA operative in Southeast Asia but was then, at his own initiative, attending a program in the United States sponsored by the Agency for International Development. A CIA officer introduced customs investigators to Khramkhruan at Syracuse University where he was studying. On June 14, 1973, the Customs Service advised the CIA that it had discovered additional evidence that Khramkhruan was directly involved in the smuggling.

The Government initially sought to use Khramkhruan as a witness against one Bruce Hoeft. Khramkhruan subsequently decided not to cooperate as a Government witness and announced he was leaving the country.[31] He was indicted for narcotics smuggling along with six Americans, including Hoeft, on August 3, 1973, by a Chicago Federal grand jury.[32]

Khramkhruan publicly claimed by spring 1974 that part of his defense would be that the CIA knew about his opium smuggling. John K. Greaney, CIA Associate General Counsel, dealt with the Federal prosecutors in Chicago. The prosecutors believed he initially promised them full cooperation, and that this meant that any necessary CIA documents would be made available for court inspection and that CIA would provide a witness to rebut any claim of Khramkhruan's that the CIA had advance knowledge of the opium shipment.[33] Greaney testified that he was confident he could "work with them".[34]

Shortly before the case was to go to trial, Greaney notified the prosecutors that no CIA documents would be turned over to them.[35] He told the U.S. attorney that the CIA would not produce documents for discovery under rule 16 of the Federal Rules of Criminal Procedure or *Brady* v. *Maryland* [36] if Khramkhruan were to stand trial, nor would the CIA provide a witness to rebut any Khramkhruan defense that the CIA knew of the smuggling in advance. The CIA also said it would not provide prior statements made by Khramkhruan to CIA officials

[30] See generally 1975 hearings at 64-74, 118-386.
[31] Id. at 226.
[32] Id. at 147-78, 153.
[33] Id. at 125-30, 219-20.
[34] Id. at 325.
[35] In a letter summarizing the case to the ranking minority member of the Senate Permanent Subcommittee on Investigations, Committee on Government Operations, dated July 7, 1975, Deputy Assistant Attorney General John O. Keeney stated that CIA attorney Greaney "advised the prosecutors that under no circumstances would the CIA turn over either to them or to the district court judge for in camera inspection, any of Mr. Khramkhruan's reports made to his superiors in Thailand or in the United States * * *. The Criminal Division of the Department of Justice accepted the position of the CIA with reference to its evaluation of the injury to the interests of the United States that might result if the Agency were to accede to requests made by the prosecutors and no attempt was made to force disclosure of reports and or production of witnesses by seeking the intervention of the White House." 1975 hearings at 154. In an early response dated June 26, 1975, to the ranking minority member of the Senate Permanent Subcommittee on Investigations, acting CIA Director Carl E. Duckett failed to distinguish between the CIA's initial cooperativeness with the Customs investigators and Chicago prosecutors and CIA's later refusals. Duckett wrote broadly: "There was no lack of cooperation between CIA and the Department of Justice, but rather there was complete disclosure to the Department of Justice of Khramkhruan's activities on behalf of the Agency and discussions of the problems associated with prosecution. This resulted in a decision by the Department that it would have been impossible to prosecute successfully."
[36] 373 U.S. 83 (1963): See discussion at p.18 infra.

as required by 18 U.S.C. § 3500 [37] if Khramkhruan were used as a witness against Hoeft.[38] He later testified that risks to the Agency had changed.[39] Greaney refused also to allow a Federal judge to examine the documents to determine whether they were relevant to the prosecution or would jeopardize national security if exposed, testifying to the subcommittee: "We have made clear that the judges in litigation are not always in a position for that." [40]

Witnesses from the Department and the CIA disagreed on whether access to particular documents was refused or not asked. Jeffrey Cole, an assistant U.S. attorney who worked for several months on the Khramkhruan case, said the CIA refused to provide the materials and that it also never told him that one document which was provided had been sanitized.[41] A Department of Justice document also referred to CIA refusal to provide documents.[42] Greaney testified, however, that the Department never specifically asked to see the documents at issue.[43] He said the CIA would have allowed Department attorneys to see the materials, although it refused to permit them to be submitted to a judge or to defense counsel in the case.[44]

By not seeing the documents at issue, the Department had no basis to confirm or rebut the CIA contention that their disclosure would endanger intelligence sources and methods. The U.S. attorney's office in Chicago, after not succeeding in obtaining access to the materials, referred the matter to the Department in Washington, but there is no indication that the Department sought access; rather, it apparently accepted the failure of the U.S. attorney's office in Chicago to obtain the materials as determinative. Thus, it was without seeing these documents that the Department reached its conclusions on what to do about the Khramkhruan case.[45]

*2. Fuller access: The Richard Helms case*

On October 31, 1977, the Department of Justice and former CIA Director Richard Helms entered into a plea bargain agreement under which Helms pleaded guilty to failing to testify fully to a Senate committee. The Department's decision to enter into this agreement was controversial.[46] However, unlike the Khramkhruan case, it appears to have been based on complete access to relevant materials rather than on inability to get such access.

CIA initially made the Department aware of questions concerning Helms' testimony,[47] and Department attorneys subsequently examined thousands of classified documents bearing on the questions raised by Helms' testimony and his possible defense to contemplated charges of perjury.[48] The Department considered that it had no access problems in the case.[49]

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[37] See discussion at p. 18 infra.
[38] See 1975 hearings at 127–28.
[39] Id. at 325.
[40] Id. at 335.
[41] Id. at 126.
[42] Id. at 430.
[43] Id. at 304, 317.
[44] Id. at 304.
[45] See pp. 12-17 infra for discussion of decisionmaking process in Khramkhruan and other cases dependent on intelligence information.
[46] See p. 15 infra.
[47] See 1978 hearings at 38.
[48] See press conference of Attorney Generall Bell and Assistant Attorney General Civiletti, Nov. 1, 1977; Department of Justice transcript at 25.
[49] See 1978 hearings at 67; staff interview with Deputy Assistant Attorney General Keuch.

### B. PRESENT PRACTICE

The Department of Justice and CIA testified to the subcommittee that for the past several years, or since the Khramkhruan case came to congressional attention, their procedures now assure the Department full access to intelligence information. Tensions still exist between the interests represented by each agency, but Department Assistant Attorney General Keuch testified that after negotiations, the Justice Department has had no ultimate problem with access.[50] CIA General Counsel Anthony Lapham testified that CIA Director Stansfield Turner has said access should not be an issue between the agencies. If any dispute came to a question of access denial, said Lapham, only the Director could refuse the access request.[51] Lapham said he would never on his own authority deny access.[52] However, the agencies have negotiated over the scope of access in cases where CIA considered a Department request to be framed more broadly than required for the particular case.[53] It must be emphasized that this level of discussions concerns only Justice Department access to materials, not the question of whether the materials could safely be made public at a trial or released to defense counsel.[54]

In the Khramkhruan case, significant negotiations with the CIA were carried on by assistant U.S. attorneys who had no prior experience in dealing with CIA matters.[55] The subcommittee expressed concern that persons inexperienced in security matters could be overwhelmed by the incantation of "national security," with the result that cases would be closed prematurely. Department Assistant Attorney General Keuch testified that current notification procedures in the Department and a memorandum from the Deputy Attorney General should prevent such an occurrence, because no investigation would be stopped based on another agency's national security claim without the approval of at least an Assistant Attorney General.[56]

## IV. Deciding Whether Conducting an Investigation or Disclosing Information in Court Proceedings Will Damage National Security

Obtaining access to national security information in the course of an investigation is only the first and easier step for the Justice Department. The frequently difficult decisions concern the extent, if any, to which the information can be used for further investigation, prosecution or other court proceeding. These decisions inevitably come down to a case-by-case balancing of risks against benefits.[57]

### A. FACTORS TO BALANCE

*1. Nature of risks*

The Director of Central Intelligence is charged by law with responsibility for protecting intelligence sources and methods from un-

[50] See 1978 hearings at 67.
[51] Id. at 63.
[52] Id.
[53] Id. at 63–64.
[54] See section IV infra for discussion of decisions on making materials public.
[55] See 1975 hearings at 133. The U.S. Attorney's manual furnished little or no guidance for such situations. Id. at 61–64.
[56] See 1978 hearings at 69–71.
[57] See 1978 hearings at 12.

authorized disclosure.[58] Such disclosures at their worst could subject undercover operatives to extreme personal danger or destroy covert operations in progress. Other information might permit a foreign intelligence agency to counteract a type of surveillance or detect future applications of some particular CIA method of operation. Disclosure of some information might pose no physical risk but would perhaps force a foreign government to react negatively against the United States, for the activities of U.S. agents in that country.

*2. Nature of benefits*

The benefits of moving ahead with an investigation, prosecution or court proceeding are essentially no different in national security cases from other kinds of cases: learning what happened, punishment of an offender, the deterrent effect on potential offenders, recovery for the Government.

*3. Chances of success*

The probability that an investigation or court case will succeed obviously must be considered. An example of the worst outcome would be disclosing legitimately sensitive material for the purpose of winning an important prosecution and then losing the case, with no benefit.

*4. Extent of informal disclosure*

In some cases, sensitive information may already have been made public by leak or other means. In some situations this may reduce the concern about making the same information public at trial, since damage has already been done. In other situations, however, making the information public at trial could confirm the accuracy of the leaked data, whose significance may have been underestimated by adversaries.

*5. Extent of disclosure in court proceedings*

If disclosure of sensitive materials can be minimized by court order or other procedure, then in some cases, the risk factor is reduced and it becomes easier to move ahead with an investigation or court proceedings. Such limitations on disclosure may not be appropriate in some situations. However, development of procedures that would permit the continuation of proceedings which otherwise would be stopped altogether is desirable. Examples and feasibility of such procedures are discussed more fully in section V.

### B. ROLE OF CIA

The CIA does not have the function of deciding whether or not a prosecution or other court proceeding should be carried out. The agency agrees that the 1954 memorandum which it took to give it such authority in some cases was not proper.[59] Its role, therefore, is not to attempt to strike final balances between risks and benefits in national security information cases. Rather, it should provide to the Justice Department its appraisal of the possible risks which could

[58] See 50 U.S.C. § 403(d). The intelligence community offers this definition for sensitive intelligence sources and methods: "A collective term for those persons, organizations, things, conditions, or events that provide intelligence information and those means used in the collection, processing, and production of such information which, if compromised, would be vulnerable to counteraction that could reasonably be expected to reduce their ability to support U.S. intelligence activities." See Glossary of Intelligence Terms and Definitions, June 15, 1978, reprinted in H. Rept. No. 95-1795, 95th Congress, 2d session (1978) at 49.

[59] See pp. 7-8 supra.

result from disclosure of relevant materials. Quoting Director Turner, CIA General Counsel Lapham agreed with this role.[60] The CIA testimony emphasized both its desire to cooperate with the Department and its ultimate option to take to the President any conclusion that a Department decision to disclose materials would have truly damaging national security effects.[61]

### C. ROLE OF DEPARTMENT OF JUSTICE

The Department's task is to balance the risks, benefits and other factors discussed above in order to reach a decision on whether to continue an investigation or initiate a court proceeding. Where information is classified, however, the Department cannot on its own release the material without its being declassified by the agency that originated the material.[62] Where the Department and the agency cannot reach agreement, then the decision must go to the President.

The Department considers each case on an ad hoc basis because, in the words of Deputy Assistant Attorney General Keuch, "the permutations of possibilities are so great." [63]

The Department's decisionmaking procedure is governed in part by a memorandum from then Assistant Attorney General Civiletti of October 4, 1977.[64] His memorandum notes that agencies will at times contend to the Department that a particular investigation or prosecution would jeopardize national security. The memo then declares:

> Under no circumstances will this Department accept such an assertion as the basis for declining to institute further investigation or prosecution in a case which would otherwise be vigorously pursued but for the national security claim. The true nature and scope of any such claim must be thoroughly and objectively evaluated and documented in all cases where declination is based solely upon national security grounds. Where a combination of factors exists, to include the existence of a national security claim, which provides a basis for declination either independently of or in conjunction with that claim, the action of this Department must be fully documented so that the record will reflect all those factors which bore on our final prosecutive determination.[65]

Similar language is contained in the United States Attorneys' Manual.[66]

A decision not to prosecute based on national security grounds is made by at least an Assistant Attorney General.[67] Reflecting the ad hoc policy testified to by Mr. Keuch, the policy declaration in the U.S. Attorneys' Manual lists no criteria or even points to check in determining when national security requires abandoning an investigation, forgoing litigation or dismissing a case. Only "the most careful consider-

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[60] See 1978 hearings at 28.
[61] Id. at 29. The CIA also at times provides a witness to testify that a defendant has not been an employee or operative of the agency. Typically this witness is from the Office of Personnel and has had various records systems checked to confirm the negative finding. Not all courts, however, have accepted this as sufficient due to the witness' lack of personal knowledge about some records. Id. at 76–77.
[62] Id. at 64; Executive Order No. 12065.
[63] Id. at 65.
[64] Id. at 43–44.
[65] Id. at 44.
[66] See U.S. Attorneys' Manual, § 9–2.163, reprinted in 1978 hearings at 53.
[67] See 1978 hearings at 70.

ation" and "personal approval" of an assistant attorney general are mandated.[68] In some cases, however, although national security information is involved, the decision not to prosecute may be based on other prosecutorial guidelines—for example, not prosecuting minor marijuana cases.[69]

### D. ROLE OF PRESIDENT

If the Attorney General and Director of Central Intelligence cannot resolve their differences over use of information, either—presumably, the one trying to stop the other from doing something—can take his case to the President.[70] If the President wanted a third opinion, he presumably could refer the question to the Intelligence Oversight Board, a White House entity with oversight responsibilities in the intelligence community[71] or the Information Security Oversight Office, an entity with oversight responsibilities for information classification.[72]

### E. PAST EXAMPLES

The Helms and Khramkhruan cases[73] illustrate the decisionmaking process at work, aside from the merit or lack of merit of the final outcomes.

*1. The Helms case*

A decision that prosecution was possible despite national security considerations was made by the Attorney General and discussed with the President, who authorized pursuit of plea bargaining.[74]

Plea bargaining with Helms' attorney was carried on by the Attorney General and Assistant Attorney General Civiletti, who had themselves reviewed some of the national security materials relevant to the case.[75] Attorney General Bell said the Department believed it had a case it could prosecute but that it also recognized the possibility that a judge might order some particular classified document admitted into evidence,[76] possibly forcing the Department to "the position where we had to dismiss in the middle of the trial."[77]

The committee approves of the fact that the highest levels of the Department involved themselves in the decision in the Helms case and then made efforts to explain the decision publicly. The subcommittee did not examine the documents at issue in the case, however, and the committee takes no position on whether the decision was proper from either a national security or policy standpoint.

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[68] See U.S. Attorneys' Manual, § 9-2.163, reprinted in 1978 hearings at 53.
[69] See 1978 hearings at 36. In these cases, an Assistant Attorney General need not, of course, make the decision.
[70] Id. at 29. In the remote event the Attorney General receives specific information that a violation of Federal criminal law has been committed by the President or the Director of Central Intelligence, or certain other top officials, a procedure is spelled out in the Ethics in Government Act of 1978 (Public Law 95-521) for the preliminary investigation and application to Federal court for the appointment of a special prosecutor. The special prosecutor is given the authority under the statute to review all documentary evidence from any source; receive appropriate national security clearances; and, if necessary, contest in court any claim of privilege or attempt to withhold evidence on grounds of national security (28 U.S.C. 594(a)(4) and (6)).
[71] See Executive Order 12036, 43 Fed. Reg. 3675 (1978) § 3.1.
[72] See Executive Order 12065, 43 Fed. Reg. 28949 (1978) § 5-2.
[73] See pp. 10-11 supra.
[74] See press conference of Attorney General Bell and Assistant Attorney General Civiletti, Nov. 1, 1977, Department of Justice transcript at 2-3.
[75] See p. 11 supra.
[76] The committee was not in a position to evaluate the likelihood of that possibility.
[77] See press conference of Attorney General Bell and Assistant Attorney General Civiletti, Nov. 1, 1977, Department of Justice transcript at 11.

*2. The Khramkhruan case*

The Khramkhruan case preceded the Department's current procedures. Its inept handling illustrated the need for the improved method for dealing with such cases which has since come about.

As discussed above,[78] the Department had little access to information which was arguably relevant to the case. Instead, it principally had only the declarations of the CIA that certain materials could not be provided for trial. By not seeing the materials, Department attorneys had no basis to evaluate the CIA contention.

Extensive testimony in 1975 left unanswered the question of who authorized the dismissal of the narcotics indictment against the CIA operative Khramkhruan.

The U.S. attorney's office in Chicago, unable to obtain information from the CIA, prepared a Form 900, Request and Authorization to Dismiss Criminal Case.[79] The form very briefly outlined the CIA's refusal to provide information and quoted the CIA as saying a trial "could prove embarrassing" It said the prosecution could not be continued unless the Department could persuade the CIA to turn over the requested material.[80]

Department procedure required that a senior official of the criminal division, not a U.S. attorney, approve any dismissal of particular indictments, including that in this case.[81] Although the form 900 implicitly requested the Department's help in getting the materials from the CIA, no further effort in that direction was made. Although Assistant Attorney General Henry Petersen had initially referred the CIA to the Chicago prosecutors for discussion of the case,[82] according to Petersen, the dismissal document never returned to him. The papers, instead, apparently, never went beyond the criminal division's narcotics section chief, William E. Ryan. Ryan's assistant, Morton Sitver examined the papers and signed Ryan's name to the dismissal form.[83] Sitver testified that he received a call from one of Petersen's deputies—either Kevin Maroney or John Keeney—requesting that dismissal be expedited.[84] Sitver therefore believed that Petersen's office had considered the dismissal and approved it.[85] Petersen testified that he did not know of any phone call to expedite the dismissal.[86] He said that the number of dismissal forms reaching his office, however, was "infinitesimal." "I would doubt that there are four a year that come up there," Petersen stated.[87] Petersen's deputy, Kevin Maroney, testified that he could not remember calling Sitver reregarding the dismissal.[88] The committee was unable to determine whether Maroney or Petersen's other deputy, John Keeney, or someone else, had made such a call.

Neither Ryan nor Petersen ever asked to see the materials which were the basis for the CIA assertion that a trial would endanger national security.[89] The record does not show that anyone in the

[78] See pp. 10-11 supra.
[79] See 1975 hearings at 430-31.
[80] Id.
[81] Id. at 60-64.
[82] Id. at 239
[83] Id. at 270.
[84] Id. at 273-74, 284-85.
[85] Id. at 284-85.
[86] Id. at 242-43, 25.
[87] Id. at 265.
[88] Id. at 66, 68.
[89] Id. at 242, 277.

Justice Department ever verified the facts that supported the CIA claim. Ryan testified that "there was acceptance of the assertion by CIA that they could not disclose the documents." [90]

At the 1978 hearings, the subcommittee pressed Deputy Assistant Attorney General Keuch on whether the Department had ever resolved the question of responsibility.[91] The Department subsequently responded that upon further investigation and review of its files, it was unable to shed any new light on who had finally ordered the dismissal.[92] The Department said, however, it had since then instituted stricter controls on such dismissals and also now prohibits a subordinate from signing a superior's name without a notation showing who has actually affixed the signature.[93]

The committee, after investigation, concludes that the Department had no basis for dismissing the indictment of Khramkhruan other than the national security assertion of the CIA. It should not on that basis have dismissed the indictment. After the dismissal, there was speculation that what the CIA really feared was a revelation that it was involved in promoting Asian drug trafficking. No such proof emerged, and the Agency denied the allegation.[94] CIA Counsel Greaney testified that embarrassment to the United States and exposure of intelligence sources and methods were both reasons the agency did not want Khramkhruan prosecuted.[95] Classified documents subsequently made available for subcommittee inspection indicated that intelligence sources and methods could have been put at risk by a trial at which Khramkhruan was either a defendant or a witness. The subcommittee was not in a position, however, to evaluate the extent of the risk. When the indictment was dismissed, Khramkhruan had already spent 11 months in jail, a time commensurate with the sentences received by others who were eventually convicted in the case.[96] The indictment of Hoeft, against whom the Department wanted Khramkhruan to testify, was dropped at the same time as that of Khramkhruan.[97]

## V. Procedures To Minimize Disclosure While Permitting Court Proceedings To Go Forward

The extent of potential exposure for national security material connected to a court proceeding is affected variously by the provisions of the Constitution, statutes, Federal court rules, past judicial decisions and the orders of a judge in the particular case.

### A. DEFENDANT'S RIGHTS

*1. Public trial*

The sixth amendment to the Constitution guarantees criminal defendants a public trial. Thus, unlike a military court-martial, ma-

[90] Id. at 277.
[91] See 1978 hearings at 40–49.
[92] Id. at 49.
[93] Id. at 47–49.
[94] See 1975 hearings at 321–22, 330.
[95] Id. at 322–23. The most evident "source and method" at risk was the name of the CIA case officer supervising Khramkhruan. The potential embarrassment concerned ongoing uprisings in Thailand by students who, Greaney testified, "were looking for ways to embarrass the U.S. Government, the military programs, and other things which were going on." Id. at 322.
[96] Id. at 152.
[97] Id.

terials cannot always be kept secret simply by closing the doors to the proceeding.[98]

*2. Elements of a crime*

In order to prove the elements of the crime at issue, such as espionage, it is necessary to introduce at trial at least some of the classified material which was the subject of the espionage.[99]

*3. The Jencks Act*

The Jencks Act [100] requires that upon a defendant's motion, the court must order the Government to produce any statements made by a witness which relate to his testimony and which are in the Government's possession. These do not have to be produced until after the witness has testified. At issue in the Khramkhruan case [101] were statements that Khramkhruan had made to the CIA and which arguably might have had to have been produced if he were used as a witness against another person accused in an opium smuggling scheme.

*4. Brady* v. *Maryland*

The Supreme Court in *Brady* v. *Maryland* [102] ruled that if the defendant requests exculpatory evidence material to his guilt or punishment, the failure of the prosecutor to produce such material is a denial of due process. The Court has since expanded this requirement for disclosure even when the defense makes no request or only a general request for exculpatory material.[103] Problems arise here when a defendant claims some sort of security agency rationale for his act.[104]

*5. Federal Rules of Criminal Procedure*

A defendant can discover any of his written or recorded statements that are in the hands of the Government under rule 16 of the Federal Rules of Criminal Procedure. Upon request the defendant also may inspect such items as books, papers, documents, and photographs held by the Government if they are material to the preparation of his defense or are intended for use by the Government as evidence at trial. However, the scope of such discovery is within the discretion of the trial judge. In some instances the Government has been successful in protecting national defense information through such discretion.[105]

*6. Federal Rules of Civil Procedure*

Discovery in civil cases is potentially wide-ranging with much discretion in the hands of the trial judge where the parties cannot reach agreement.[106] Comparable security questions are currently at issue in the Socialist Workers Party civil damages suit against the Govern-

[98] See 1978 hearings at 4.
[99] Id. at 3.
[100] 18 U.S.C. § 3500.
[101] See pp. 10-11 supra.
[102] 373 U.S. 83 (1963).
[103] See *United States* v. *Agurs*, 427 U.S. 97 (1976).
[104] For example: Defendant is charged with illegal break-in, but claims break-in was directed by an intelligence agency. Agency denies allegation. Defendant then moves to discover documents which show his previous ties to agency on unrelated matters, claiming these will support his account of dealings with agency. Agency doesn't want to provide materials because they would disclose details of intelligence operations. If materials are not provided, however, defendant should win dismissal if judge finds insufficient compliance with *Brady*.
[105] See 1978 hearings at 4.
[106] See Federal Rules of Civil Procedure 26(c), 37.

ment, where Attorney General Bell has declined to reveal the names of certain informers despite an order by the trial judge.[107]

### B. JUDICIAL DETERMINATIONS

In some situations, the Department of Justice may conclude that particular materials cannot be released at trial, but also may consider that the materials are not sufficiently relevant that the judge would order them produced. In such situations, then, the prosecution or other proceeding can be preserved by submitting the materials to the judge provided he then rules them not sufficiently relevant. If the CIA or other agency refuses to make the materials available even for scrutiny by the judge, however, then the judge may be forced to assume they are relevant, with the result that the case cannot be maintained.

In the Khramkhruan case, although the CIA argued that certain materials would not have to be provided to the defense,[108] the Agency said it would refuse to make them available for examination by the trial judge to make that determination. Thus the Department of Justice concluded it could not, in accordance with law and legal ethics, pursue the prosecution.[109] CIA General Counsel Lapham and Deputy Assistant Attorney General Keuch testified, however, that for at least the two most recent years, no case has been dropped because of a refusal to provide information for a judge's in camera review on the question of its relevancy.[110] Although the material may be highly sensitive and the Government may be unwilling to proceed if the judge rules that it must be disclosed to the defense, the judge is not subjected to a security clearance.[111] However, other courtroom personnel such as a stenographer transcribing an in camera proceeding may be given a security clearance by CIA based on a background check by the FBI.[112]

Somewhat analogous in camera proceedings are provided for the evaluation of citizen requested national security material under the Freedom of Information Act.[113] In these cases, the judge is empowered to examine a contested document in camera and to determine on de novo review whether the item is properly classified and thus withholdable by an agency. These determinations frequently are made without presence of the party requesting the information, a procedure criticized by some litigants in this field who contend that plaintiffs' arguments could be made without compromising the information in advance of the judge's determination.[114] In an FOIA case, of course, a determination that material was not properly classified normally leads to its release to the requester and thus to the general public.

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[107] See *Socialist Workers Party* v. *Attorney General*, No. 73-3160 (S.D.N.Y.). The district court's citing of Attorney General Bell for contempt of court in refusing to divulge informant identities has been recently overturned by the Court of Appeals. *In re the Attorney General of the United States*, Nos. 78-6114, 6179, 3050 (2d Cir. Mar. 19, 1979).

[108] See 1975 hearings at 333-35.

[109] Id. at 124-27.

[110] See 1978 hearings at 65-66.

[111] Id. at 76.

[112] Id.

[113] 5 U.S.C. § 552(a)(4)(B), 552(b)(1). Exemption (b)(1) of the Freedom of Information Act permits withholding of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order".

[114] See generally hearing on security classification exemption to the Freedom of Information Act before a subcommittee of the House Committee on Government Operations, 95th Congress, 1st session, transcript at 70-101 (Sept. 20, 1977).

If the material is properly classified, then it may be withheld from release. Proper classification would normally not be an issue in a relevancy proceeding, although a judge's view of the propriety of classification could affect the nature of the protective order he might issue if the material were relevant and the government proceeded with its case.

Propriety of classification is an issue in certain criminal prosecutions, for example, where the criminal act is knowing and willful disclosure of classified cryptographic information to the detriment of the United States.[115] Both the classification and harm issues have been considered to be fact determinations for a jury, leading in some cases to a reluctance to prosecute. It can be argued on the basis of the FOIA experience, however, that the propriety of classification should be considered a legal question for decision by a judge. Revision of the criminal disclosure statute could also make the question of harm a legal question for the judge, leaving to the jury the question of the defendant's intent and whether he in fact disclosed the material. This would reduce the need to present classified information at a public trial and thus the reticence to prosecute in security cases. At the same time, such a procedure would be far less drastic than proposals to make disclosure of classified information a strict liability crime in which the fact of classification need not be shown to be proper.

Apart from the question of determining the propriety of the classification of a record sought as evidence at trial, the committee agrees with the view expressed by the CIA General Counsel that a disclosure of any sort to the Department of Justice in the course of the performance of the Department's duties would be an authorized disclosure not restricted by 50 U.S.C. 403(d).[116]

### C. PROTECTIVE ORDERS

In some circumstances, material which must be presented at trial or to the defense may be at a sensitivity level such that the Government does not want it made fully public but is willing to release it on a limited basis so that the proceeding can continue. In some of these cases, judges have issued protective orders sufficient to protect a defendant's rights while also curbing the risk of adverse disclosure. A recent court of appeals opinion in a civil case said that in issuing a protective order, which would prohibit a party from revealing discovered information, the trial court must consider three elements: Nature of the harm posed by dissemination of the material at issue, the precision of the proposed restriction on dissemination, and whether less intrusive alternatives are available.[117]

For example: In the case of a former U.S. Government employee who was arrested after throwing classified documents onto the lawn of a Soviet office in Washington, the court issued a protective order governing the documents and others seized at the suspect's home. The order permitted the defense to have access to the documents, but

[115] See 18 U.S.C. § 798. The Justice Department emphasizes that the mere fact that information is classified does not satisfy the requirements of the espionage statutes that the disclosed information relate to national security. See 1978 hearings at 82.

[116] See footnote 15 supra.

[117] See *In re Halkin*, No. 77-1313 (D.C. Cir. Jan. 19, 1979). In a civil proceeding, protective orders are issued under the authority of rule 26(c) of the Federal Rules of Civil Procedure.

prohibited their public disclosure and forbade the defense from showing them to defense experts.[118]

In the case of two young men accused of making satellite secrets available to the Soviets, a protective order named specific members of the defense team who could inspect particular documents and required court approval before anyone else could inspect the documents. Limitations on note-taking and a prohibition on photocopying also were imposed.[119]

In the case of a U.S. employee and Vietnamese accused of improperly disclosing classified material, a protective order, among other things, required the defense to maintain a log of persons to whom documents at issue were shown, and very specifically described the type of secure cabinet in which they must be kept.[120]

Provisions also have been made to permit a jury to see documents when necessary to deliberations. But this disclosure has been considered by the CIA to be limited enough so that the documents have retained their security classification.[121]

In prosecuting cases, however, the Department of Justice has not always been able to win the agreement of judges to its view on what protections should be imposed.

In the perjury trial of an International Telephone & Telegraph Corp. executive, the judge refused to accept the Government's plan to let prosecutors challenge potentially sensitive evidence before it could be introduced by the defense at trial. The U.S. Court of Appeals declined to require the trial judge to adopt such a procedure. The Government then dismissed the prosecution.[122]

Another Federal judge refused to approve the plea bargain settlement of a corporate foreign bribery payment case when the settlement document did not name the country or official implicated.[123] This matter was resolved after the name of the country leaked out anyhow.

Where a protective order is issued, its principal ingredients govern who can see the material at issue and how it is to be protected physically. Because different judges issue the orders, these restrictions vary. One order, for example, may permit defense counsel to keep copies of materials in their safes. Another order may require counsel to examine materials at a Justice Department secured reading room. A standard form for such orders would provide greater consistency of treatment and presumably ease the task of judges not routinely used to dealing with classified information.

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[118] See 1978 hearings at 134–45.
[119] Id. at 146–49.
[120] Id. at 150–73.
[121] Id. at 83–84. President Carter's 1978 Executive order on classification of national security information does not speak directly to the issue of whether such information can be used at trial while retaining its classification. See Executive Order No. 12065, 43 Fed. Reg. 28949 (July 3, 1978). Language in the order could provide support for either side of an argument on this point. Section 3–303 on declassification policy provides that "the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified." Section 4–101 on general restrictions to access provides that no person should have access to classified information unless "determined to be trustworthy and unless access is necessary for the performance of official duties." Exceptions to this requirement are provided in 4–301 only for historical researchers and former presidential appointees. A juror could be considered to be performing official duties, but whether trustworthiness can be determined without a security check is questionable.
[122] See Washington Post, Oct. 31, 1978, p. A2; Jan. 27, 1979, p. A12; Feb. 9, 1979, p. A1; Mar. 8, 1979, p. A3. For the Government's argument to the appellate court, see 1978 hearings at 176–211.
[123] See Washington Post, Oct. 25, 1978, pp. 1, 26.

## VI. Recommendations

The existence of the 1954 agreement between the Department of Justice and the CIA, and the Department's handling of the dismissal of an indictment against CIA operative Puttaporn Khramkhruan clearly were unacceptable. In the several years since these activities came to light, however, and in response to the subcommittee's concerns expressed at hearings and elsewhere, the Department and the CIA have both changed procedures. Therefore, some recommendations which would have been appropriate at that time now have become moot.

The memorandum of agreement between the Director of Central Intelligence and the Attorney General, as revised following the subcommittee's hearing of September 19, 1978, appears to be a suitable basis for the CIA's carrying out its responsibilities under 28 U.S.C. § 535. However, the committee believes that continued congressional monitoring of the arrangement is necessary, and recommends further oversight of the CIA's reporting of cases to Justice.

The committee recommends that the Justice Department review its existing agreements with other agencies to confirm that they are similarly suitable under the requirements of § 535; special attention should be given to such agreements with agencies having intelligence-gathering responsibilities. Following this review, the House Judiciary Committee should amend § 535 to eliminate or narrow the apparent broad discretion given the Attorney General under § 535(b)(2) to exempt agencies from reporting to the Attorney General whole categories of crimes not otherwise assigned by statute. It should be further clarified that the section covers only the delegation of investigative responsibility, not the power to decide whether prosecution is feasible.

The committee believes that the memorandum of October 4, 1977, from Assistant Attorney General Civiletti and the elaborating testimony of Deputy Assistant Attorney General Keuch concerning refusal to prosecute for national security reasons constitute a sufficient procedure within the Department to avoid the lack of responsibility that characterized the dismissal of the Khramkhruan indictment. It now appears that the Justice Department is obtaining disclosure of facts it seeks concerning alleged intelligence and law enforcement employee criminal violations. The Justice Department, not the affected agencies, makes an evaluation on a case-by-case basis whether or not to prosecute these violations. However, any procedure is subject to the good faith of those persons carrying it out and any procedure may be eroded over time as the reasons for the procedure fade in memory. Therefore, the committee recommends:

> The procedure concerning refusal to prosecute for national security reasons should be promulgated by the Attorney General in a permanent fashion; and the Attorney General should specifically designate a departmental official or officials at the level of Assistant Attorney General or higher to approve such a refusal. Although each case is unique, the Department should attempt to set out some general criteria against which to measure arguments for and against prosecution. This would assure that considerations

common to most cases—for example, public interest, propriety of security classification, and age of the events or documents in question—are always taken into account, not inadvertently forgotten because of emphasis on some other consideration.

In negotiating with agencies over the availability of national security material, the Department should, where appropriate, request that the agency conduct a formal declassification review of the material at issue before the Department accepts an agency's assertion that the material cannot be used. The Department should consider it proper in the case of disputed material to request classification review by the Information Security Oversight Office created under Executive Order 12065.

Copies of the written justification required by the policy for a refusal to prosecute should be provided to the House and Senate Intelligence and Judiciary Committees on an informational basis in cases where the charge not prosecuted is a felony.

The committee also recommends:

In cases which have attracted broad public attention but which the Department declines to prosecute, the Department should state its reasons publicly at least to the extent that rights of putative defendants are not abrogated. The Department's statement of January 1977, concerning its decision not to prosecute CIA mail-openings in the United States is an example of such a public statement.

The Department should draft a proposal for the development of a specific framework for consistent use of judicial protective orders concerning national security matters at trial. This proposal should include a model protective order or orders. The proposal should then be presented to appropriate bodies such as the advisory committees concerned with the Federal rules of evidence, civil procedure and criminal procedure. The committee's objective in this recommendation is to promote the ability to prosecute, defend or litigate in such cases while lessening security risks. The objective is not to give the Government additional grounds for refusing to produce such material to defendants or litigants.

The President should consider amending Executive Order 12065, section 4–3, with appropriate security clearance mechanisms, to provide for juror access to national security information. This would permit the use of such information at trial without raising the argument that such use results in declassification of the information.

The Committee on Government Operations should hold hearings in coming months to review legislative proposals to resolve or alleviate many of the issues covered in this report.

# APPENDIX

## Department of Justice Decision on Prosecution of CIA Mail-Opening, January 14, 1977

### Report of the Department of Justice Concerning Its Investigation and Prosecutorial Decisions With Respect to Central Intelligence Agency Mail Opening Activities in the United States

The Department of Justice has decided, for reasons discussed in this report, not to prosecute any individuals for their part in two programs involving the opening of mail to and from foreign countries during the years 1953 through 1973.

On June 11, 1975 the President transmitted to the Attorney General the report of the Commission on CIA Activities within the United States (the Rockefeller Commission). The President asked the Department of Justice to review the materials collected by the Commission, as well as other relevant evidence, and to take whatever prosecutorial action it found warranted. At the direction of the Attorney General, the Department's Criminal Division conducted an investigation to determine whether any Government officer or employee responsible for CIA programs described in chapter 9 of the Commission report, involving the opening of mail taken from U.S. postal channels, or responsible for related or similar activities of the Federal Bureau of Investigation, had committed prosecutable offenses against the criminal laws of the United States. Such an investigation was immediately begun by the staff of the Criminal Division and regular reports on its status were made to the Attorney General.

On March 2, 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities acceded to the Department's request that the Criminal Division be allowed access to the documentary evidence in its possession concerning the projects. In August 1976 the Criminal Division submitted to the Attorney General a report summarizing the evidence it had acquired, and analyzing the legal questions that potential prosecutions would present. The report concluded that it was highly unlikely that prosecutions would end in criminal convictions and recommend that no indictments be sought.

Because of the importance of this recommendation and its conclusion that a prosecution would so likely fail, the Attorney General and the Deputy Attorney General asked the Criminal Division to review its analysis and findings, and in addition asked experienced criminal lawyers in the Tax Division to undertake a review. As part of the review process, three experienced U.S. attorneys, and two specially appointed consultants, Professors Herbert Wechsler and Philip B. Kurland, were asked to participate in an evaluation of the recom-

mendations with the Attorney General, the Deputy Attorney General, the Solicitor General, and the Assistant Attorney General for the Criminal Division.[1]

The Department has now completed its investigation into the mail-opening projects and has examined in detail the elements of the crimes that may have been committed, the defenses that might be presented, and the proof that would be required to establish the commission of crimes and refute the expected defenses.

Although the Department is of the firm view that activities similar in scope and authorization to those conducted by the CIA between 1953 and 1973 would be unlawful if undertaken today, the Department has concluded that a prosecution of the potential defendants for these activities would be unlikely to succeed because of the unavailability of important evidence [2] and because of the state of the law that prevailed during the course of the mail-openings program.

It would be mistaken to suppose that it was always clearly perceived that the particular mail opening programs of the CIA were obviously illegal. The Department believes that this opinion is a serious misperception of our Nation's recent history, of the way the law has evolved and the factors to which it responded—a substitution of what we now believe is and must be in the case for what was. It was until recent years by no means clear that the law and, accordingly, the Department's position, would evolve as they have. A substantial portion of the period in which the conduct in question occurred was marked by a high degree of public concern over the danger of foreign threats. The view both inside and, to some extent, outside the Government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope. For a variety of reasons judicial decisions touching on these problems were rare and of ambiguous import. Applied to the present case, these circumstances lead to reasonable claims that persons should not be prosecuted when the governing rules of law have changed during and after the conduct would give rise to the prosecution. They also would support defenses, such as good faith mistake or reliance on the approval of Government officials with apparent authority to give approval. Whether these arguments would be acceptable legal defenses is not necessarily dispositive. As Judge Leventhal has reminded us: [3]

> Our system is structured to provide intervention points that serve to mitigate the inequitable impact of general laws while avoiding the massive step of reformulating the law's requirements to meet the special facts of one harsh case. Prosecu-

[1] In the course of these deliberations, it became clear that no decision to prosecute could responsibly be made on one of the two mail-opening projects—the West Coast project which is described on pages 20–21, infra—within the 5-year statute of limitations set forth in 18 U.S.C. § 3283. In any event, it was the unanimous view that, because the West Coast project was of relatively brief duration, small in scale, and directed only to incoming mail, any potential prosecution inevitably would focus on the CIA's East Coast mail-openings, described on pages 7–19. These openings ended in early 1973, and only the last year of the project is within the statute of limitations. This is enough, however, to allow a prosecution to be commenced with respect to these acts and the entire agreement, dating to 1953, to open mail.

[2] Important evidence would be missing because of the great length of time between the commencement of the mail openings and the holding of a potential trial. Many important participants in the process have died, and because some of the events occurred a generation ago, the memories of other witnesses have dimmed.

[3] *United States* v. *Barker*, C.A.D.C., No. 74-1883, decided May 17, 1976 (dissenting opinion), quoting from *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943).

> tors can choose not to prosecute, for they are expected to use their "good sense * * * conscience and circumspection" to ameliorate the hardship of rules of law. Juries can choose not to convict if they feel conviction is unjustified, even though they are not instructed that they possess such dispensing power.

These factors would make difficult a showing of personal guilt. The issue involved in these past programs, in the Department's view, relates less to personal guilt than to official governmental practices that extended over two decades. In a very real sense, this case involves a general failure of the Government, including the Department of Justice itself, over the period of the mail opening programs, ever clearly to address and to resolve for its own internal regulation the constitutional and legal restrictions on the relevant aspects of the exercise of Presidential power. The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to support the notion that the governmental power, in scope and manner of exercise, was not subject to restrictions that, through a very recent evolution of the law and the Department's own thinking, are now considered essential. In such circumstances, prosecution takes on an air of hypocrisy and may appear to be the sacrifice of a scapegoat—which increases yet again the likelihood of acquittal. And in this case, an acquittal would have its own costs—it could create the impression that these activities are legal, or that juries are unwilling to apply legal principles rigorously in cases similar to this.

Where a prosecution, whether successful or not, raises questions of essential fairness, and if unsuccessful could defeat the establishment of rules for the future, the Department's primary concern must be the proper operation of the Government for the present and in the future. The Department of Justice has concluded, therefore, that prosecution should be declined. At the same time, however, the need of eliminating legal ambiguities and of guiding future conduct in this field demands a precise public statement of the Department's position on the law—namely, that any similar conduct undertaken today or in the future would be considered unlawful. Ordinarily public announcements of reasons for declining prosecution are not made, for they may invade the privacy of the potential defendants and charge them with misconduct while denying them an opportunity to respond in court. The circumstances of this case justify an exception to that rule. Publication of the Rockefeller Commission and Senate Select Committee reports, with their extensive descriptions of the mail opening programs, substantially diminishes any harm to the potential defendants' reputations that could be caused by public explanation of the Department's position. The harm is further diminished by the description of the circumstances and the considerations of fairness on which the Department's decision not to prosecute ultimately rests. * * *

## ADDITIONAL VIEWS OF HON. PAUL N. McCLOSKEY, JR.

In 12 years in the House of Representatives, I have not been privileged to see a more important report issued by this committee. Included in its 26 pages of discussion are several points of such significance to our constitutional evolution as to merit special comment.

(1) For 20 years, between 1954 and 1973, the Attorney General of the United States effectively declined to prosecute crimes committed by CIA employees.

(2) He did so under a law which this report recommends now be amended—section 535(b)(2) of title 28, U.S. Code, a law enacted in 1954 which gave the Attorney General discretion to waive investigation of crimes by an agency if he chose to do so.

(3) During the same 20-year period, 1954 to 1973, it was the view of Presidents and their advisors that national security justified the commission of crimes by CIA personnel.

(4) Pursuant to this view, the Attorney General agreed with the Director of the CIA in 1954, that the CIA need not disclose criminal acts by CIA employees to Justice for prosecution. This agreement lasted until the Watergate disclosures of 1974, and but for this committee's oversight hearings, would probably still be in effect.

In recommending that all CIA criminal activity be required to be fully disclosed to the Justice Department, and in obtaining both CIA and Justice's assent thereto, at least for the present, the committee has done far more than force mere disclosure of hitherto-hidden information. The requirement of disclosure should have the practical effect of inhibiting CIA criminal conduct itself. Certainly CIA managers will be inhibited from authorizing such conduct on grounds of national security.

This new standard of conduct for intelligence operations should be understood for what it is—a radical change of a policy which existed for 20 years. As the landmark Justice Department decision of January 14, 1977, appended to this report, states:

> * * * The actions of Presidents, their advisors in such affairs, and the Department itself might have been thought to support the notion that the Government power, in scope and manner of exercise, was not subject to restrictions that, through a very recent evolution of the law and the Department's own thinking, are now considered essential * * *
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> * * * The view both inside and, to some extent, outside the Government was that, in response to exigencies of national security, the President's constitutional power to authorize collection of intelligence was of extremely broad scope * * *

"was of extremely broad scope" was polite language for "included approval of criminal conduct."

As late as November, 1973, the President and most of the Congress felt that the national security justified ordinary criminal conduct such as burglary, or in the words of the trade, "surreptitious entry."

In November, 1973, however, a significant event occurred. White House assistant Egil Krogh, facing trial for the burglary of a doctor's office (in order to obtain potentially embarrassing records on Viet Nam War opponent Daniel Ellsberg) placed the national security issue in a different perspective.

Pleading guilty, Krogh stated to the Court:

> The sole basis for my defense was to have been that I acted in the interest of national security. However, upon serious and lengthy reflection, I now feel that the sincerity of my motivation cannot justify what was done, and that I cannot in conscience assert national security as a defense. I am therefore pleading guilty because I have no defense to this charge.
>
> My decision is based upon what I think and feel is right and what I consider to be the best interests of the nation.

Subsequently, the convictions of Attorney General Mitchell and top Presidential aides Haldeman and Ehrlichman formalized the demise of national security as a defense to crime.

That national security is no longer a defense to criminal conduct, however, imposes an even greater burden on the Office of the Attorney General, since as the committee report recognizes, there are some cases of criminal conduct which should not be prosecuted because the national security may require that the facts of either the crime or the defense not be publicly disclosed.

If the decision to prosecute is to be made solely by the Attorney General, and if public faith in the integrity of the process is to be restored, it seems clear the public must have faith that the Attorney General is wholly immune from the political influence which traditionally accompanied the Cabinet Office of the Attorney General. Elliot Richardson's resigning as Attorney General rather than discharging Special Prosecutor Archibald Cox set the historical example. No longer can a President appoint his brother, as did Jack Kennedy. No longer will an Attorney General serve as a President's campaign manager as John Mitchell served Richard Nixon.

I think Gerry Ford's greatest contribution to the Nation may perhaps turn out to be his appointment of the nonpolitician, Edward Levi, as Attorney General—and the preserving of the Attorney General's independence from Presidential influence in matters of political concern such as the *Boston School* case and the charges against the President himself by the Maritime Unions which were ultimately discredited.

It would seem that President Carter, in the appointment of Attorney General Griffin Bell, has continued the tradition of independence set by Richardson and Levi, and hopefully the tradition will become a permanent one.

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